No. 09-1212

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER

v.

BILLY GROVES, INDIVIDUALLY, DBA SAVANNAH
RE-LOAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the courts below had subject-matter jurisdiction to grant and affirm summary judgment in favor of respondents in petitioner's suit to recover "demurrage" charges for prolonged possession of its railway cars.

2. Whether a warehouseman becomes liable for railroad demurrage when he is named as consignee on a bill of lading and accepts delivery of goods by rail, even if he is unaware of his designation as consignee.

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This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The terms of a shipment of goods by rail, like the terms of a shipment of goods by any common carrier, have traditionally been set forth in a document known as a "bill of lading." See 49 U.S.C. 11706(a). "A bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract of carriage." *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543

U.S. 14, 18-19 (2004). A bill of lading names both a "consignor," who is the originator of the goods, and a "consignee," who is the formally designated entity "to whom or to whose order the bill promises delivery." *Paper Magic Group, Inc.* v. *J.B. Hunt Transp., Inc.*, 318 F.3d 458, 461 (3d Cir. 2003) (quoting U.C.C. § 7-102 (2002)); see also *Black's Law Dictionary* 350 (9th ed. 2009) (defining "consignor" and "consignee"). The bill of lading will sometimes instruct the carrier to deliver directly to the named consignee; other times, it will instruct delivery to someone else, such as another carrier. See, *e.g.*, *Middle Atl. Conference* v. *United States*, 353 F. Supp. 1109, 1117 (D.D.C. 1972) (three-judge panel) (describing "shipments moved by rail to dockside, thence by lighters and barges to the steamships that would ultimately deliver them to their consignees"). When a bill of lading instructs delivery to a middleman such as a "warehouseman"—an entity that temporarily stores goods between legs of a multi-leg shipping journey—that middleman may, or may not, be named as the consignee. Pet. App. 6a.

Longstanding law and practice in the transportation industry permit a carrier to impose charges when its equipment is detained beyond a certain length of time for loading or unloading. See *Middle Atl. Conference*, 353 F. Supp. at 1113-1115. The practice of railroads charging for the overlong detainment of railcars is known as "demurrage." *Id.* at 1113. "All demurrage charges have a double purpose. One is to secure compensation [to the railroad] for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *ICC* v. *Oregon Pac. Indus.*, 420 U.S. 184, 189-190

(1975) (quoting *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 271 U.S. 259, 262 (1926)).

The efficiency of railroads and the prevention of undue detention of railcars are matters of national importance. As history has repeatedly demonstrated, a shortage of railcars can seriously impede the flow of commerce. See, *e.g.*, *Oregon Pac. Indus.*, 420 U.S. at 189 ("Car shortages, [a congressional report] found, resulted in short supplies of basic foods in the markets 'with attendant high prices.'") (quoting H.R. Rep. No. 18, 65th Cong., 1st Sess. 1 (1917)); *Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distribution, Rules and Practices*, 323 I.C.C. 48, 50 (1964) ("Car shortages of varying duration and severity have been with us for decades and in every national emergency. They have occurred each year during periods of peak loadings and in about every producing area of the country."); *Chrysler Corp.* v. *New York Cent. R.R.*, 234 I.C.C. 755, 759-760 (1939) (describing severe railcar shortages between 1906 and 1922).

2. In light of the strong federal interest in efficient railroad operation, the federal government for over a century has exercised "broad powers" to regulate demurrage and other railroad-related matters. *Turner, Dennis & Lowry Lumber Co.*, 271 U.S. at 262; see, *e.g.*, *Iversen* v. *United States*, 63 F. Supp. 1001, 1004 (D.D.C. 1946) (three-judge panel) (discussing regulatory adoption of the Uniform Demurrage Code in 1909). Those powers originally belonged to the Interstate Commerce Commission (ICC), see *ibid.*, but now belong to its successor, the Surface Transportation Board (Board), pur-

suant to the ICC Termination Act of 1995 (Act), Pub. L. No. 104-88, 109 Stat. 803. See 49 U.S.C. 10101 *et seq.*

Under the current statutory framework, as relevant here, the Board "has jurisdiction," subject to certain limited exceptions, "over transportation by rail carrier that is" either "only by railroad" or "by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. 10501(a); see note 2, *infra*. Rail carriers subject to the Board's jurisdiction must maintain their availability to provide carriage "on reasonable request" by anyone. 49 U.S.C. 11101(a). Such railroads are furthermore obligated to "establish reasonable * * * rates, * * * rules, and practices" for the carriage services they offer. 49 U.S.C. 10702.

With respect to demurrage, railroads subject to Board jurisdiction must "compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to * * * (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property." 49 U.S.C. 10746. Railroads commonly comply with this requirement by publishing a tariff (*i.e.*, a set of rates for services) that sets the terms for demurrage, along with other charges. See, *e.g.*, Pet. 9 (reproducing relevant provisions of the tariff at issue in this case). The Board is empowered to hold adjudications to determine whether a regulated railroad's demurrage rates and practices (as well as other rates and practices) are reasonable. 49 U.S.C. 10702, 10704(a)(1), 10746, 11701(a). If a particular rate or practice is found to be unreasonable, the Board "may order the carrier to stop" it, and also "may prescribe the maxi-

mum rate, classification, rule, or practice to be followed." 49 U.S.C. 10704(a)(1). The Board additionally has general authority to promulgate regulations governing rail practices. 49 U.S.C. 721(a).

The Board's authority, like the ICC's before it, extends to determining the classes of entities against which demurrage charges may be imposed. 49 U.S.C. 10702, 10746. In the analogous context of "detention" charges for trucking, for example, the ICC previously held a tariff to be unreasonable if it imposes liability on intermediaries who are "not beneficial owners of the freight, who are not named as consignors or consignees in the bills of lading, and who are not otherwise party to the contract of transportation." *Responsibility for Payment of Det. Charges, E. Cent. States*, 335 I.C.C. 537, 541 (1969) (emphasis omitted) (*Eastern Central*), aff'd, *Middle Atl. Conference, supra.* An adjudicatory petition, filed in 2008, is currently pending before the Board that raises the related question of whether a warehouseman may be held liable for demurrage when it is named as a consignee in a bill of lading without its consent. *Springfield Terminal Ry.—Petition for a Declaratory Order*, NOR 42108. And, as discussed more fully below, the Board has recently initiated a rulemaking proceeding that will address demurrage issues more generally, including the assessment of demurrage against warehousemen who have been designated as consignees without their consent or without their knowledge. See generally App., *infra.*

3. a. This case involves demurrage charged by petitioner, a railroad that engages in activities subject to regulation by the Board, against respondents, who operate a warehousing business in Savannah, Georgia. Pet. App. 2a, 5a; Pet. 13, 18. Beginning in late 2006, a freight

forwarding company, Galaxy Forwarding, arranged on numerous occasions for goods to be shipped from domestic shippers to Savannah for export by sea. Pet. App. 3a. Pursuant to bills of lading received from Galaxy, petitioner would deliver goods to respondents. *Ibid.* Respondents would unload the freight, reload it into shipping containers, and, based on instructions from Galaxy, send the freight along to nearby ports for overseas transportation. *Id.* at 2a-3a, 25a. Although respondents never took any ownership interest in the freight, and were never the final destination for the goods, some of the bills of lading (though not all of them) named respondents' warehousing business as the consignee of the goods. *Id.* at 6a, 25a.

Respondents did not participate in arranging these bills of lading, and the record indicates that respondents were not provided with advance copies. Pet. App. 3a, 6a. Instead, respondents would receive unilateral notice from Galaxy about impending deliveries, accompanied by instructions for exporting the goods. *Id.* at 3a, 25a. Petitioner would notify respondents when railcars were ready for delivery, and would coordinate the delivery of full railcars, and the removal of empty ones, from respondents' facility. *Id.* at 4a.

In March 2007, Galaxy began sending rail freight to respondents at such a volume that demurrage accrued. Pet. App. 4a. Petitioner's tariff provided that petitioner could assess demurrage "against * * * the consignee at destination who will be responsible for payment." Pet. 9; see *ibid.* (tariff defined "[c]onsignee" as "[t]he party to whom a shipment is consigned or the party entitled to receive the shipment"). Petitioner presented respondents with a bill for demurrage. Pet. App. 7a. Respondents refused to pay. *Ibid.*

b. Petitioner filed suit against respondents in the Southern District of Georgia. Pet. App. 24a. As amended, its complaint sought demurrage for those shipments on which respondents' business was named as the consignee on the bill of lading. *Id.* at 7a. The district court granted respondents' motion for summary judgment on the ground that respondents could not be held liable for demurrage on shipments when the bills of lading had named their business as a consignee without their knowledge or consent. *Id.* at 7a-8a, 27a-34a. The district court determined that respondents had submitted unrebutted evidence that they were never notified, either by petitioner or by Galaxy, until after demurrage charges had already accrued that the bills of lading named their business as the consignee of the freight. *Id.* at 27a.

The court of appeals affirmed. Pet. App. 21a. The court observed that "[t]he parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges, that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it, and that a consignee" who is merely acting as an agent for the beneficial owner of the freight "may avoid demurrage liability by disclosing its agency status [to the railroad] prior to accepting delivery of the shipment" pursuant to a procedure set forth in 49 U.S.C. 10743(a)(1). Pet. App. 13a; see 49 U.S.C. 10743(a)(1) (providing that, upon proper notice to a carrier, "a consignee that is an agent only" may avoid certain types of charges). "[T]he key question," the court stated, was "whether [respondents' business] was a consignee in the context of this case." Pet. App. 13a.

The court of appeals perceived a "conflict of authority" on that issue between the Seventh and Third Circuits. Pet. App. 14a. The Seventh Circuit had held that

"being listed by third parties as a consignee on some bills of lading is not alone enough to make [a warehouseman] a legal consignee liable for demurrage charges." *Ibid.* (quoting *Illinois Cent. R.R.* v. *South Tec Dev. Warehouse, Inc.*, 337 F.3d 813, 821 (7th Cir. 2003)). The Third Circuit had held that "an entity named on a bill of lading as the sole consignee, without any designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers." *Id.* at 15a (quoting *CSX Transp. Co.* v. *Novolog Bucks County*, 502 F.3d 247, 262 (3d Cir. 2007), cert. denied, 552 U.S. 1183 (2008)). The Third Circuit had reasoned that this was the easiest rule to administer, that a consignee becomes a party to a transportation contract by accepting delivery of the freight, and that agent-consignees could avoid unwanted liability by providing notice of their agency status to the railroad under 49 U.S.C. 10743(a)(1). *CSX Transp. Co.*, 502 F.3d at 254-259.

The court of appeals in this case held that the Third Circuit's rule "cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties." Pet. App. 17a. In order to be liable for demurrage, the court stated, "a party must assent to being named as a consignee on the bill of lading * * *, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly." *Id.* at 19a. The court reasoned that consignee status is at least quasi-contractual, and that contract principles do not permit an entity to be designated as a consignee without its knowledge or agreement. *Id.* at 18a.

4. On December 6, 2010, the Board issued an Advance Notice of Proposed Rulemaking announcing its

intent "to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers and receivers." App., *infra*, 1a. One of the demurrage issues that the Board intends to address in particular is "the law when a warehouseman who accepts rail cars and holds them too long is named as consignee in the bill of lading, but asserts that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee." *Id.* at 6a (emphasis omitted).

The Board's attention became focused on broader demurrage issues due to the potentially divergent approaches of the Third Circuit and the court of appeals in this case. App., *infra*, 3a. In the Board's view, "the best answer in this matter is not readily apparent," "there are shortcomings" in both courts' approaches, and resolution of the issue would benefit from "broad public input." *Id.* at 7a.

One of the primary reasons why the Board believes that public input, and a rulemaking proceeding more generally, would be useful is that the legal framework governing demurrage developed at a time when industry practices were different than they are now. App., *infra*, 2a-8a. Bills of lading, for example, are now handled electronically, rather than on paper, and industry practice involving consignee designation "is evolving." *Id.* at 8a. The Board is accordingly requesting comment from industry participants and others regarding industry practices and the impact various alternative demurrage rules might have. *Id.* at 10a-12a.

DISCUSSION

The Court should deny certiorari and allow the Board to apply its expertise to resolve the issue of de-

murrage liability for warehousemen, as well as other related demurrage issues, through its pending rulemaking proceedings. The current legal uncertainty about the liability of warehousemen for demurrage arises in the context of considerable factual uncertainty about current industry practices. The Board has proposed to proceed by rulemaking, rather than agency adjudication, in order to obtain more information about those practices and the ways in which the imposition of demurrage liability on various types of entities would affect rail transportation overall.

A rulemaking proceeding has advantages not only over agency adjudication, but judicial adjudication as well. Rulemaking provides the Board with greater fact-finding capability than a court, and permits the agency to craft prospective, context-specific solutions to practical problems, as well as to dispense with potentially outdated agency precedent. These sorts of inherent agency advantages often lead courts, under the doctrine of "primary jurisdiction," to refer the initial resolution of highly technical matters to agencies with special industry expertise. A similar rationale counsels in favor of denying certiorari here, and allowing the issue of warehouseman demurrage to be resolved in the first instance by the Board, rather than by this Court on review of a limited summary-judgment record.

1. As an initial matter, petitioner suggests (Pet. 26-30) that this Court should grant certiorari to consider whether the court of appeals "infringed upon the exclusive jurisdiction of the [Board] and rendered a judgment beyond its power" in deciding whether respondents could be held liable for demurrage. That suggestion lacks merit.

Petitioner, which has invoked the federal courts' jurisdiction as both the plaintiff and the appellant in this case, never argued to the court of appeals (even in its rehearing petition) that the federal courts lack authority to decide whether respondents may, as a matter of law, be held liable for demurrage. Nor did the court of appeals address that threshold issue. This Court does not ordinarily consider issues that were neither pressed nor passed upon below, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), and there is no reason to deviate from that practice here. Although a litigant (or the court itself) may question subject-matter jurisdiction at any stage of the proceedings, "even initially at the highest appellate instance," *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004), this Court has no obligation to grant certiorari whenever a petitioner asserts for the first time that a lower court exceeded its jurisdiction.

Even if the jurisdictional issue had been properly presented below, it still would not warrant certiorari. The Act expressly contemplates that a rail carrier may file "a civil action to recover charges for transportation or service provided by the carrier." 49 U.S.C. 11705(a). Petitioner contends that courts are nonetheless deprived of subject-matter jurisdiction over certain rail-charge-related matters by 49 U.S.C. 10501(b), which provides:

> The jurisdiction of the Board over * * * transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers * * * is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail

transportation are exclusive and preempt the remedies provided under Federal or State law.

The First Circuit has held that Section 10501(b) is a preemption provision that displaces remedies under state law (or other federal law) as a substantive matter, not a provision that strips federal courts of subject-matter jurisdiction. See *Pejepscot Indus. Park, Inc.* v. *Maine Cent. R.R.*, 215 F.3d 195, 200-205 (2000). Petitioner fails to identify any court of appeals that has adopted petitioner's contrary view of the statute.[1] The issue therefore does not independently warrant certiorari, though if the Court were to grant review on the substantive question of demurrage liability, it would be appropriate to grant review on this threshold question as well.

2. a. The Court should, however, deny certiorari on both questions, in light of the pending proceedings before the Board. The Board is "the expert body Congress has designated to weigh the many factors at issue when assessing whether a rate is just and reasonable." *BNSF Ry.* v. *Surface Transp. Bd.*, 526 F.3d 770, 774 (D.C. Cir. 2008). The principles animating the doctrine of primary jurisdiction strongly favor allowing the Board to estab-

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[1] Moreover, it is not clear what the scope of petitioner's position regarding subject-matter jurisdiction is, or that petitioner's articulation of its position actually covers this case. Petitioner contends that "[t]o the extent" that "questions are raised regarding the enforceability or reasonableness of the terms of any rail carrier's tariff," those questions fall within the Board's exclusive jurisdiction. Pet. 28. The court of appeals did not expressly hold petitioner's tariff to be unreasonable or unenforceable. The court concluded that both the Act and petitioner's tariff provided for assessment of demurrage against a "consignee," see Pet. App. 5a-6a, 11a-13a, but held that respondents' business was not a consignee, *id.* at 14a-21a.

lish a default rule (or rules), in the first instance, for demurrage liability.[2]

The primary-jurisdiction doctrine "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 64 (1956). "[I]n such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Ibid.*

Although the decision whether to grant certiorari in this case does not literally present a question of primary jurisdiction—because the Court is not deciding whether to suspend and refer a proceeding, but instead whether to exercise discretionary review over a proceeding that overlaps with a proposed rulemaking—the considerations are similar. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (observing that this Court is "not the sole body that could eliminate [circuit] conflicts, at least as far as their continuation into the future is concerned," and factoring the pendency of proceedings be-

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[2] Such a rule could apply to all rail transportation within the Board's jurisdiction. The Board has statutory authority, which it has exercised in the past, to exempt certain rail services from some or all of the otherwise applicable statutory provisions. See 49 U.S.C. 10502(a). Under that provision, however, the Board could decide not to exempt any rail carriers from demurrage rules it promulgates. See, *e.g.*, 49 C.F.R. 1039.14 (transportation in boxcars exempted from many regulatory provisions, but not all). Moreover, for services that already have been exempted, the Board has authority to revoke exemptions. See 49 U.S.C. 10502(d). Rail carriers additionally may enter into private contracts with their customers that are beyond the Board's jurisdiction. See 49 U.S.C. 10709. To the extent, if any, that the existence of such contracts might affect the imposition of demurrage, the Board will be able to assess and consider that factor in its rulemaking proceeding.

fore the United States Sentencing Commission into its determination not to address a particular issue). In particular, as this Court has recognized, "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far E. Conference* v. *United States*, 342 U.S. 570, 574-575 (1952).

b. Determining whether, or when, warehousemen should be liable for railroad demurrage is precisely the type of question upon which the Board's "specialization," its "insight gained through experience," and its "more flexible procedure" can all usefully be brought to bear. See *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976) ("The doctrine [of primary jurisdiction] has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency, particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency—such as matters turning on an assessment of industry conditions.") (citations omitted). The Board (both now and when it was the ICC) has longstanding legal and practical expertise in demurrage matters. See pp. 3-5, *supra*; App., *infra*, 3a & n.2 (citing cases). Such expertise, extending beyond the record developed in a particular case in court, is highly relevant to consideration of the question presented here. To take but one example of a relevant fact-based disagreement between the parties, respondents contend that ware-

housemen are "already incentivized," even in the absence of demurrage liability, "to return empty rail cars as quickly as possible." Br. in Opp. 16. Petitioner responds that "[t]his argument ignores the realities of the marketplace." Reply Br. 7. The Board, with its extensive experience, and ability to gather information about the industry as a whole, is in a better position to resolve that factual dispute (particularly in a rulemaking proceeding) than a court (particularly in a summary-judgment posture) would be.

Significantly, despite its specialized industry knowledge, even the Board itself does not feel well-enough informed, at present, to establish a comprehensive demurrage policy,[3] and has accordingly requested public comment on a variety of factual matters. App., *infra*, 10a-12a. One of those matters concerns the precise factual dispute just mentioned: whether there is "benefit to the warehouseman from holding rail cars." *Id.* at 12a. Other factual issues on which the Board seeks public comment include "how the paperwork attending a shipment of property by rail is processed"; how that paperwork "gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status that they are assigned in the bill of lading"; whether "actual placement of freight cars on the track of the shipper or receiver constitute[s] adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred"; whether such

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[3] As noted above, a declaratory-order proceeding has been pending before the Board raising the question whether a party may be held liable for demurrage charges when it is named as a consignee in a bill of lading without its consent. See *Springfield Terminal Ry.*, discussed at p. 5, *supra*. That proceeding is still ongoing; the Board issued its latest order in the case on June 11, 2010.

an entity receives adequate notification in the case of a "constructive placement" (in which cars are temporarily placed elsewhere when the shipper's or receiver's own track is unavailable); and how certain applications of the rule adopted by the court of appeals in this case would "affect industry practice." *Id.* at 10a-12a. A court is not in an optimal position to engage in such a broad inquiry involving numerous interested parties, and, even if it were, it would lack the relevant expertise to discern which submissions, among potentially contradictory ones, have the greatest force.

c. Even assuming that a court were able to get an accurate picture of industry practices, it would lack the flexibility that the agency enjoys to craft a legal regime to address any problems that may exist. As far as the Board is concerned, the issue of demurrage liability for warehousemen does not, and should not, simply involve a binary choice between legal rules adopted by different courts of appeals. Indeed, the Board has expressed skepticism about each of the rules adopted by the circuits. The Board has observed that the Third Circuit's rule, which "places dispositive weight on the designation given to the warehouseman in the bill of lading," may not be consistent with modern (electronic) bill-of-lading practices. App., *infra*, 7a. On the other hand, the decision below, the Board has noted, "overlooks the fact that" imposition of demurrage liability on a warehouseman might be the best way to encourage efficient use of freight cars, "because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded." *Id.* at 8a.

For example, one potential solution that would be beyond a court's power to adopt, but could be implemented by the Board, would be to adopt revised bill-of-

lading practices to assure that "all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.)" receive timely notice of each bill of lading that pertains to them, and to require that bills of lading "accurately reflect the de facto status of each party in relation to other parties involved with the transaction." App., *infra*, 10a-11a. Such requirements could avoid situations, like in this case, in which a railroad believes that a warehouseman is a consignee, but the warehouseman believes himself to be a non-consignee intermediary.

Another respect in which the Board has more flexibility than a court is in its ability to reconsider old regulatory precedent. The Board has stated, for example, that it is open to reconsidering the ICC's decision in *Eastern Central* that interpreted the predecessor of 49 U.S.C. 10743(b)—which permits a consignee that is merely an agent for someone else to avoid liability for certain charges if it informs the railroad of its agency status—to apply to demurrage charges. App., *infra*, 8a-9a. The ICC order in *Eastern Central* was affirmed by the three-judge district court in *Middle Atlantic Conference*, *supra*, (see p. 5, *supra*), which decision was in turn addressed both by the court of appeals in this case and by the Third Circuit in *CSX Transportation Co.* See Pet. App. 9a-10a, 12a, 16a; 502 F.3d at 258 n.11, 261-262. A court would generally be required to defer to the existing agency interpretation. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). The Board, however, may "consider varying interpretations and the wisdom of its policy on a continuing basis." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (*Brand X*) (quoting *Chevron*, 476 U.S. at 863-864); see *American Trucking Ass'ns* v. *Atchison*,

Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967) ("[F]lexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency."). It therefore has the discretion to adopt a new interpretation of this (or another) statute, in which event that new interpretation would be entitled to judicial deference. *Brand X*, 545 U.S. at 981. By doing so, the agency can alter the legal landscape in ways that a court cannot.

This is not to say that courts have no role to play in the regulation of demurrage. A rule promulgated by the Board would be subject to judicial review in the court of appeals (and then, possibly, in this Court). See 28 U.S.C. 2321(a), 2342(5), 2344; see also 28 U.S.C. 1254(1). There accordingly is no concern that proceedings before the Board would result in any procedural unfairness, or in a rule that exceeded the Board's legal authority. In reviewing a rule promulgated by the Board, a court would have the benefit of the record compiled by the Board as well as the application of the Board's expertise to that record—advantages that are absent from this case in its current posture.

3. The decision below does not create immediate practical problems of a magnitude that warrants granting certiorari now, notwithstanding the pending proceedings before the Board. Litigation on the question presented has been relatively sparse. See App., *infra*, 5a-6a. The decision below was rendered over a year ago, and the Board is not aware of major problems that have arisen during the intervening period. There is no reason to think that such problems will arise while the Board proceedings are pending. If they did, however, they could perhaps be mitigated by petitioner and other carriers through modifications of their notification pro-

cedures, and the Board would additionally be in position to handle them through adjudications and (if necessary) emergency rulemaking.

Furthermore, the Board intends to act quickly on this matter. See App., *infra*, 1a (closing comment period on Advance Notice of Proposed Rulemaking on February 23, 2011). To the extent that the Board proceedings may take somewhat longer than a decision by this Court would, the benefits of permitting a regulatory solution far outweigh the minimal burden of a modest delay in awaiting that solution.

That is true not only for reasons already discussed, but also because further review in the present case would not resolve all outstanding issues relating to demurrage. There are a number of variations in the circumstances under which a railroad might attempt to impose demurrage liability, not all of which are encompassed within the question presented in this case. For example, the Board's request for comments highlights the possibility that there may be cases in which a "warehouseman or other receiver * * * reap[s] financial gain" by holding on to railcars and using them for excess storage capacity. App., *infra*, 12a. If that were to occur, it might be proper to impose demurrage liability on an unjust enrichment theory, even if in other circumstances demurrage liability for a warehouseman might be inappropriate. See *ibid.*

Because of that potential issue, as well as others, the Board may well need to proceed with its rulemaking even if certiorari is granted. And the results of that rulemaking could potentially supersede the Court's decision, at least in certain respects. See, *e.g.*, *Brand X*, 545 U.S. at 982-985; pp. 17-18, *supra*. For that reason, in

addition to the reasons previously explained, further review in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

APPENDIX

41269 SERVICE DATE—DECEMBER 6, 2010
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 707

DEMURRAGE LIABILITY

Decided: December 3, 2010

AGENCY: Surface Transportation Board (Board or STB).

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: Through this Advance Notice of Proposed Rulemaking (ANPR), the Board is instituting a proceeding regarding demurrage, *i.e.*, charges for holding rail cars. The agency's intent is to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers.

DATES: Comments are due by January 24, 2011. Reply comments are due by February 23, 2011.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at http://www.stb.dot.gov. Any person submitting a fil-

ing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: STB Ex Parte No. 707, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Craig Keats at 202-245-0260. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.)

SUPPLEMENTARY INFORMATION: Demurrage—the assessment of charges for holding railroad-owned rail freight cars for loading or unloading beyond a specified amount of time—has compensatory and penalty functions. It compensates car owners for the use of their equipment, and by penalizing those who hold cars too long, it encourages prompt return of rail cars into the transportation network. Because of these dual roles, demurrage is statutorily recognized as an important tool in ensuring the smooth functioning of the rail system.

Since the earliest days of railroad regulation, there have been disputes about who should be responsible for paying demurrage. Certain principles for allocating liability for holding carrier equipment became well established over time and were reflected in agency and

court decisions.[1] Regulatory and technological changes over the years, however—such as the elimination of required tariff-filing and the advances in electronic commerce—suggest a need to revisit the matter to consider whether the Board's policies should be revised to account for current statutory provisions and commercial practices.

The Board has long been involved in resolving demurrage disputes, both as an original matter and on referral from courts hearing railroad complaints seeking recovery of charges.[2] Our attention became focused on the possible need to examine our policies, however, when some tension developed in the federal courts of appeals regarding the liability of warehousemen and similar third-party car receivers for railroad demurrage.[3] As

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[1] See *Responsibility for Payment of Detention Charges, Eastern Cent. States*, 335 I.C.C. 537, 541 (1969) (*Eastern Central*) (involving liability of intermediaries for detention, the motor carrier equivalent of demurrage), *aff'd, Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1114-15 (D.D.C. 1972) (3-judge court sitting under the then-effective provisions of 28 U.S.C. § 2321 et seq.) (*Middle Atlantic*).

[2] *E.g., Eastern Central*; *Springfield Terminal Ry.—Petition for Declaratory Order*, NOR 42108 (STB served June 16, 2010); *Capitol Materials Inc.—Petition for Declaratory Order—Certain Rates and Practices of Norfolk S. Ry.*, NOR 42068 (STB served Apr. 12, 2004); *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp., Debtor—Petition for Declaratory Order—Assessment and Collection of Demurrage and Switching Charges*, NOR 42030 (STB served June 14, 2000); *South-Tec Dev. Warehouse, Inc., and R.R. Donnelley & Sons Company—Petition for Declaratory Order—Illinois Cent. R.R.*, NOR 42050 (STB served Nov. 15, 2000); *Ametek, Inc.—Petition for Declaratory Order*, NOR 40663, *et al.* (ICC served Jan. 29, 1993), *aff'd, Union Pac. R.R. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir. 1997).

[3] *Compare Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) (*Groves*), *pet. for cert. pending*, No. 08-15418 (filed Apr. 6, 2010), *with*

we reviewed the two lines of analysis, we began to consider the possibility that neither court's approach produces an optimal outcome given the current statutory and commercial environment. We therefore are instituting this proceeding in an effort to update our policies regarding responsibility for demurrage liability and to promote uniformity in the area.

The Interstate Commerce Act (IC Act), as amended by the ICC Termination Act of 1995 (ICCTA), provides that demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage and to establish demurrage-related rules "in a way that fulfills the national needs related to" freight car use and distribution and that will promote an adequate car supply. In the simplest case, demurrage is assessed on the "consignor" (the shipper of the goods) for delays at origin and on the "consignee" (the receiver of the goods) for delays at destination.

An important issue has always been who is liable for demurrage when goods are shipped to warehousemen, transloaders, or other "intermediate" stops in the transportation chain before reaching their ultimate destination. Notwithstanding the usual common-law liability (for both freight charges and demurrage) of a consignee that accepted delivery,[4] the issue was more complicated

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CSX Transp. Co. v. Novolog Bucks Cnty., 502 F.3d 247 (3d Cir. 2007) (*Novolog*).

[4] *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink*, 250 U.S. 577, 581 (1919); *Groves*, 586 F.3d at 1278.

for warehousemen, who typically are not "owners" of the property being shipped. The law became well accepted that, for a warehouseman to be subject to demurrage or detention charges, there had to be some other basis for liability outside the mere fact of handling the goods shipped.[5] And what became the most important "other basis" was whether the warehouseman was shown as the consignee on the bill of lading.[6] Thus, our predecessor, the Interstate Commerce Commission (ICC), held that a tariff[7] may not lawfully assess such charges on a warehouseman who is not the beneficial owner of the freight, who is not named as a consignor or consignee in the bill of lading, and who is not otherwise party to the contract of transportation, "e.g., a warehouseman who receives the freight pursuant to an 'in care of' designation."[8]

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[5] *See, e.g., Smokeless Fuel Co. v. Norfolk & W. Ry.*, 85 I.C.C. 395, 401 (1923).

[6] A bill of lading is the basic transportation contract between the shipper and the carrier; its terms and conditions bind the shipper, the originating carrier, and all connecting carriers.

[7] Historically, carriers gave public notice of their rates and general service terms in tariffs that were publicly filed with the ICC and that had the force of law under the so-called "filed rate doctrine." *See Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency was repealed in ICTA.

[8] *Eastern Central*, 335 I.C.C. at 541. The "in care of" designation refers to the principle of agency law under which a consignee—although presumed to be an owner generally liable for freight charges upon acceptance of goods—could be relieved of such liability if the carrier were made aware that the receiver of the goods was accepting the goods only as an agent for the actual owner. The *Novolog* court, 502 F.3d at 255, found that agency principles such as these became incorporated into the IC Act in the 1920s in what is now 49 U.S.C. § 10743(a). See *Novolog*, 502 F.3d at 255. That statutory provision states that a consignee

The absence of any litigation over the matter suggests that the accepted rule described above provided some degree of certainty for several decades. In recent years, however, a new issue has arisen: what is the law when a warehouseman who accepts rail cars and holds them too long *is* named as consignee in the bill of lading, but asserts either that it did not know of its consignee status or that it affirmatively asked the shipper not to name it consignee? On that issue, the Eleventh Circuit in *Groves* looked to contract principles and found that a party shown as a consignee in the bill of lading is not in fact a consignee unless it expressly agreed to the terms of the bill describing it as a consignee.[9] On virtually identical facts, the Third Circuit in *Novolog* held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another [party] and comply with the notification procedures in [the] consignee-agent liability provision [of] 49 U.S.C. § 10743(a)(1)."[10] That provision

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that informs the railroad in writing that it is only an agent is not liable for "additional rates that may be found due after delivery."

[9] Relying in part on *Illinois Cent. R.R. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) (*South Tec*), which did not directly decide the issue but that indicated a predilection toward such a result, *Groves* found the warehouseman not to be a consignee and thus not liable for demurrage even though the warehouse accepted the freight cars as part of its business and held them beyond the period of free time.

[10] 502 F.3d at 254. *Novolog* cited *Middle Atlantic*, the Uniform Commercial Code, and the Federal Bills of Lading Act to find (502 F.3d at 258) that a warehouseman (or, in that case, a transloader) could be a "legal consignee" even if it was not the "ultimate consignee." The court found that a contrary result, such as the one suggested in *South Tec*, would frustrate what it viewed as the plain intent of § 10743: "to facili-

relieves certain receivers of property from liability for certain rates if it notifies the carrier in writing that it is not the owner of the property, but rather is only an agent for the owner.

Discussion

We believe that broad public input would assist us in addressing the liability of a warehouseman who accepts rail cars and holds them too long, but who asserts either that it did not know that it had been designated the consignee on the bill of lading or that it affirmatively asked the shipper not to name it consignee. Indeed, even with the extensive discussions in *Novolog* and *Groves*, the best answer in this matter is not readily apparent. *Novolog* relies on a broad reading of § 10743(a)(1) (one that the ICC appeared to share), along with policy reasons why a rule requiring that a warehouseman explicitly accept potential demurrage liability would not be a good idea. *Groves* relies on contract law principles to support its view that a receiver of goods must explicitly agree before it can be a consignee subject to liability. But neither approach seems clearly superior, and indeed there are shortcomings with each.

Novolog, for example, cites valid transportation reasons for putting liability on the party best able to release the rail cars (the warehouseman) or to decline the

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tate the effective assessment of charges by establishing clear rules for liability" by permitting railroads to rely on bills of lading and "avoid wasteful attempts to recover [charges] from the wrong parties." 502 F.3d at 258-59. The court found warehouseman liability equitable because the warehouseman—which otherwise has no incentive to agree to liability—can avoid liability under § 10743(a) simply by identifying itself as an agent, whereas the rail carrier has no option but to deliver to the named consignee. *Id.* at 259.

cars if it knows that its facility is already overcrowded. Yet *Novolog* places dispositive weight on the designation given to the warehouseman in the bill of lading, which historically was a paper document that was consciously agreed upon by the carrier and the shipper (although it did not require any action by the consignee). Today, however, transactional paperwork such as the bill of lading is largely handled electronically, and the role of the railroad, the shipper, and the listed consignee in making the designation is evolving. In *Groves*, for example, it is unexplained why some of the bills named the warehouseman as the consignee while others did not.

Groves, for its part, is unsatisfying in various ways. First, it overlooks the fact that, because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded, finding the warehouseman to be responsible for demurrage would best advance the intent of 49 U.S.C. § 10746 (efficient use of freight cars). Moreover, although we share the concern that a party might be made liable for charges without its knowledge,[11] as the decision in *Novolog* points out, it is also true that the warehouseman is the one who has the relationship with the shipper, and it should not be the carrier's responsibility to investigate whether the relationship described in the bill of lading accurately reflects the de facto status of the parties.

Finally, notwithstanding the ICC's finding in Eastern Central in 1969, we are not certain that the provisions of 49 U.S.C. § 10743 should be interpreted to apply

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[11] *See West Point Relocation, Inc. & Eli Cohen—Petition for Declaratory Order*, FD 35290 (STB served Oct. 29, 2010).

to demurrage. The language of § 10743 ("[l]iability for rates for transportation") can be read to focus on the shipping charges themselves, and not on accessorial charges such as demurrage. As explained in Hub City and Hall,[12] the statutory provision, which was first enacted in the Transportation Act of 1920 as an anti-discrimination provision, was modified in 1927 to address the liability of a sales agent for freight charges that turned out to be higher than those originally paid. It was further modified in 1940 to address the liability of an agent vis a vis a beneficial owner for additional freight charges resulting when shipments were reconsigned and refused at destination. Neither event speaks to application of the provision to demurrage. Moreover, because § 10743(b) does not apply to a shipment that is prepaid, applying § 10743 to demurrage as well as line-haul charges could have the curious effect of making the consignee liable for demurrage if the shipment is not prepaid, but not liable for the same conduct—holding the cars too long—if it is prepaid. That would be in some tension with the historic (and statutory, see 49 U.S.C. § 10746) purposes of demurrage: to compensate the equipment owner and to facilitate prompt return of cars.

For all of these reasons, we are instituting this proceeding to explore whether we should look to a new way of determining the liability of warehousemen for demurrage.

One possible rule would place liability for demurrage on the receiver of the rail cars, regardless of the desig-

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[12] *Blanchette v. Hub City Terminals, Inc.*, 683 F.2d 1008 (7th Cir. 1981); *Union Pac. R.R. v. Hall Lumber Sales, Inc.*, 419 F.2d 1009 (7th Cir. 1969).

nations in the bill of lading, if the carrier has provided the receiver with adequate notice of liability. (If the receiver were an agent of another party, we assume that the usual principal-agent rules would govern, although we request comments on this point.) What constitutes "adequate notice" could be decided on a case-by- case basis either by the Board or the federal courts in collection actions, or it could be established by rule. Given the potential industry-wide implications of such rules, broad public input is warranted.

Accordingly, we seek comment on these matters. In their comments, parties may address any relevant matters, but we specifically seek comment on the following, which we believe will assist us in developing an appropriate way of allocating liability that advances the purposes of demurrage and also is consistent with the IC Act, contract law, agency law, and principles of notice/fairness:

- Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in Eastern Central, is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?

- Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading.

For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the de facto status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the de facto status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do.

- With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or similar non-owner receiver best be made aware of its status vis a vis demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?

- Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?

- Given the discussions in Hub City and Hall, should § 10743 be read as applicable to demurrage charges at all? The ICC said it was in Eastern Central, but it did so with little discussion. Would general agency principles apply to demurrage liability even if § 10743 were found inapplicable?

- If § 10743 is applicable, would the *Groves* analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?

- Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic, 353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?

The requirements of section 603 of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, et seq., (RFA) do not apply to this action because, at this stage, it is an ANPR and not a "rule" as defined in section 601 of the RFA. Under the RFA, however, the Board must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If adoption of any rule likely to result from this ANPR could have a significant economic impact on a small entity within the meaning of the RFA, commenters should submit as part of their comments an explanation of how the business or organization falls within the definition of a small entity, and how and to what extent the comment-

er's business or organization could be affected. Following review of the comments received in response to this ANPR, if the Board promulgates a notice of proposed rulemaking regarding this matter, it will conduct the requisite analysis under the RFA.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Initial comments are due on January 24, 2011.

2. Reply comments are due on February 23, 2011.

3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.